

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

In the Matter of the Application of)  
MERCER TRANSPORTATION CO., INC. )  
For a Motor Carrier Certificate or )  
Or Permit. )  
\_\_\_\_\_ )

DOCKET NO. 2006-0404

DECISION AND ORDER NO. 23144

DIV. OF CONSUMER ADVOCACY  
DEPT. OF COMMERCE AND  
CONSUMER AFFAIRS  
STATE OF HAWAII

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K. Higashi

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

In the Matter of the Application of)

MERCER TRANSPORTATION CO., INC. )

Docket No. 2006-0404

For a Motor Carrier Certificate or )  
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DECISION AND ORDER

By this Order, the commission denies Don's Makiki, Inc.'s ("Movant") motion to intervene in the matter of the application of MERCER TRANSPORTATION CO., INC. ("Applicant") for authority to operate as a contract carrier of property by motor vehicle over irregular routes on the island of Oahu in the specific commodities (military vehicles) classification, pursuant to a contract with Matson Integrated Logistics, Inc., a subsidiary of Matson Navigation Company ("Matson") to transport Stryker military vehicles for the Department of Defense ("DOD").

I.

Background

A.

Application

By application filed on October 10, 2006, Applicant requested permanent authority<sup>1</sup> to operate as a contract

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<sup>1</sup>By Decision and Order No. 22862, filed on September 15, 2006, in Docket No. 2006-0378, Applicant was granted temporary

carrier of property by motor vehicle over irregular routes on the island of Oahu in the specific commodities (military vehicles) classification, pursuant to a contract with Matson ("Application"). According to Applicant, it "is fit, willing and able to properly perform the service of a contract carrier by motor vehicle, and to conform to [Hawaii Revised Statutes] Chapter 271 and the lawful requirements, rules and regulations of the Commission."<sup>2</sup> In addition, it "is consistent with the public interest and transportation policy as it is, at this juncture, the only carrier that can transport the highly sensitive and classified Stryker military vehicles in accordance with the Department of Defense requirements" which is "critical to national defense and the war on terrorism."<sup>3</sup>

B.

Motion to Intervene

On November 22, 2006, Movant filed a motion to intervene in this proceeding ("Motion to Intervene"). According to the Motion, Movant is a "common carrier of general commodities certificated by this Commission to conduct, inter alia, specialized and heavy hauling" and is "ready, willing

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authority to operate as a contract carrier of property by motor vehicle over irregular routes on the island of Oahu in the specific commodities (military vehicles) classification for a period of one hundred and twenty (120) days, subject to certain conditions described in the Decision and Order.

<sup>2</sup>Application at 7.

<sup>3</sup>Id.

and able to perform specialized and heavy hauling common carrier services on a '24/7' basis."<sup>4</sup>

According to Movant, it has "property, financial, commercial and other interests in the pending proceeding" as it is ready, willing and able to perform the specialized heavy hauling services required by the DOD, and, in fact, already performed such services, by hauling "more than 25 of the Stryker vehicles, including some that were of the highest priority and/or requiring the highest security."<sup>5</sup> According to Movant, the DOD's security requirements for its Stryker vehicles "are not needed, are inapplicable and certainly are waivable for the short-haul drayage the government requires in an island environment."<sup>6</sup>

Movant, moreover, argues that its interests are unique as one of only two carriers authorized to conduct specialized and heavy hauling and towing, and there are no other means for it to protect its interest, as the commission is the only government agency authorized to regulate motor carrier services in Hawaii. In addition, Movant argues that its interest will not be represented if intervention is not granted, as no party has moved to intervene, and the Division of Consumer Advocacy has declined to participate in this proceeding. Movant further states that its participation will assist in the development of a sound record and that its participation will not broaden the issues nor delay the proceeding. According to Movant, an evidentiary

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<sup>4</sup>Motion to Intervene at 1.

<sup>5</sup>Motion to Intervene at 2.

<sup>6</sup>Motion to Intervene at 2-3.

hearing is required, and the commission should grant the Motion to Intervene and set a date for a prehearing conference to arrange for the exchange of information and to set a procedural schedule.<sup>7</sup>

C.

Applicant's Opposition to Motion to Intervene

On December 1, 2006, Applicant filed a memorandum in opposition to the Motion to Intervene ("Opposition Memorandum") arguing that the Motion to Intervene should be denied because it fails to satisfy the intervention requirements contained in Hawaii Administrative Rules ("HAR") § 6-61-55. According to Applicant, Movant's allegations are not reasonably pertinent to the issues in this proceeding and its participation would unreasonably broaden the issues presented. Applicant asserts that it was hired for the sole purpose of transporting highly sensitive and classified Stryker military vehicles for the DOD, and that it is the "only qualified property motor carrier in the State of Hawaii ('State') that can provide the proper Transportation Protective Services ('TPS'), as required by the DOD, to transport the highly sensitive and classified Stryker military vehicles."<sup>8</sup> According to Applicant, "the trucking contractor must have an operational Defense Transportation Tracking System ('DTTS') and that "Movant has not sought, nor

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<sup>7</sup>Movant did not request a hearing on the Motion to Intervene.

<sup>8</sup>Opposition Memorandum at 4.

does it have the operational or security clearance to obtain access to the DTTS."<sup>9</sup> In addition, "drivers for the Applicant are required to possess a level of clearance at 'SECRET' with the Defense Security Service and the DOD" and "Movant's drivers also do not possess these security clearances."<sup>10</sup> According to Applicant, the DOD "temporarily waived the security requirements needed to transport certain Stryker military vehicles and allowed these Stryker military vehicles to be hauled by a trucking contractor who did not meet the requisite security requirements and clearances due to exigent circumstances. However, in doing so, those transportation movements were done only under secured military escort. Due to associated security risks, as well as the ongoing troop deployments and the resulting impact on available resources, [the DOD] indicated [it is] unwilling to waive such requirements in the future."<sup>11</sup>

Applicant also argues that some of Movant's representations are incorrect, particularly its assertion that it is ready, willing and able to transport the Stryker military vehicles. According to Applicant, Movant failed to provide evidence from Matson or the DOD that it could transport the vehicles as required by the DOD. Without the qualifications required by the DOD and Matson to provide the transportation service, Movant's allegations are not pertinent to the issues raised in this proceeding.

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<sup>9</sup>Opposition Memorandum at 4.

<sup>10</sup>Opposition Memorandum at 5.

<sup>11</sup>Opposition Memorandum at 5 n.3.

Applicant, moreover, argues that Movant's participation will unduly delay the proceedings and will not assist the commission in developing a sound record. According to Applicant, Movant's assertions and requests reveal an intent to prevent or delay Applicant from entering the motor carrier market in the State, and is anti-competitive and monopolistic.

D.

Response to Motion to Intervene<sup>12</sup>

On December 6, 2006, Movant filed a Response to Applicant's Memorandum in Opposition to Motion to Intervene ("Movant's Response") in which it argues that Applicant has offered no new evidence on the issues the commission must consider, and that it is not attempting to delay the proceeding as the Stryker transportation must be completed by April 2007.

II.

Discussion

It is well established that intervention as a party in a commission proceeding "is not a matter of right but is a matter resting within the sound discretion of the commission." See In re Application of Hawaiian Elec. Co., Ltd., 56 Haw. 260, 262, 535 P.2d 1102, 1104 (1975). See also In re

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<sup>12</sup>Commission rules do not allow for the filing of a response to a motion. See HAR § 6-61-41. Although Movant did not receive leave to file the Response (nor did it request approval to file the Response), the commission, in its discretion, will not strike the Response, but will instead afford it the appropriate weight.

Paradise Merger Sub, Inc., et al., Docket No. 04-0140,  
Order No. 21226 (August 6, 2004).

HAR § 6-61-55 sets forth the requirements for  
intervention. It states, in relevant part:

- (a) A person may make an application to intervene and become a party by filing a timely written motion in accordance with sections 6-61-15 to 6-61-24, section 6-61-41, and section 6-61-57, stating the facts and reasons for the proposed intervention and the position and interest of the applicant.
- (b) The motion shall make reference to:
  - (1) The nature of the applicant's statutory or other right to participate in the hearing;
  - (2) The nature and extent of the applicant's property, financial, and other interest in the pending matter;
  - (3) The effect of the pending order as to the applicant's interest;
  - (4) The other means available whereby the applicant's interest may be protected;
  - (5) The extent to which the applicant's interest will not be represented by existing parties;
  - (6) The extent to which the applicant's participation can assist in the development of a sound record;
  - (7) The extent to which the applicant's participation will broaden the issues or delay the proceeding;
  - (8) The extent to which the applicant's interest in the proceeding differs from that of the general public; and
  - (9) Whether the applicant's position is in support of or in opposition to the relief sought.

HAR § 6-61-55(a) and (b). Section 6-61-55(d), however, states that "[i]ntervention *shall not* be granted except on allegations



which are reasonably pertinent to and do not unreasonably broaden the issues already presented." (Emphasis added.)

Here, after reviewing the entire record, the commission finds that Movant's allegations are not reasonably pertinent to the resolution of the Application and that intervention by Movant will likely unreasonably broaden the issues presented. At issue with respect to the Application is whether Applicant's performance of its contract with Matson on behalf of the DOD is consistent with the public interest and the transportation policy articulated in HRS Chapter 271. For example, as pointed out by Movant, one of the factors to be considered is the changing character of shipper requirements. Movant, however, cannot provide evidence on that subject, as information regarding current shipping requirements is within Matson and the DOD's control. The DOD and Matson, moreover, have already provided the commission with information describing the nature of the DOD requirements, and stating the understanding that there are no motor carriers in the State capable of performing the service, as required by the DOD.<sup>13</sup>

As noted in prior commission orders, the fact that Movant may have a financial interest in preventing unwanted competition is insufficient and purely speculative; especially given the DOD's requirements for this contract. Movant, moreover, has other means by which to protect its market share. Movant, for example, could obtain the necessary qualifications and provide better service than its competitors

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<sup>13</sup>See Opposition Memorandum, Exhibits A and B.

or more competitive pricing. See In re Robert's Tours & Transp., Inc., 104 Hawai'i 98, 109, 85 P.3d 623, 634 (Haw. 2004) (affirming the commission's decision to grant a motor carrier authority to operate where "it would encourage competition and constrain otherwise monopolistic operations"). Given the April deadline for completion of the contract, Movant's participation as an intervenor is only likely to delay the proceeding. For the foregoing reasons, the commission concludes that the Motion to Intervene should be denied.

III.

Order

THE COMMISSION ORDERS:

Don's Makiki, Inc.'s Motion to Intervene, filed on November 22, 2006, is denied.

DONE at Honolulu, Hawaii DEC 18 2006.

PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

By Carlito P. Caliboso  
Carlito P. Caliboso, Chairman

By John E. Cole  
John E. Cole, Commissioner

APPROVED AS TO FORM:

Stacey Kawasaki Djou  
Stacey Kawasaki Djou  
Commission Counsel

2006-0404.eh

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing Decision and Order No. 23144 upon the following parties, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

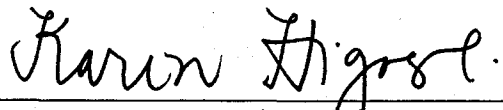
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DATED: DEC 18 2006